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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064-AE38

Treatment of Financial Assets Transferred in Connection with a Securitization or Participation

AGENCY: Federal Deposit Insurance Corporation (“FDIC”).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The FDIC is proposing a rule that would revise a provision of its Securitization Safe Harbor Rule, which relates to the treatment of financial assets transferred in connection with a securitization or participation, in order to clarify a requirement as to loss mitigation by servicers of residential mortgage loans.

DATES: Comments on the Proposed Rule must be received by [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

You may submit comments, identified by RIN number, by any of the following methods:

- **Agency Web Site:** <http://www.FDIC.gov/regulations/laws/federal>. Follow instructions for submitting comments on the agency web site.
- **E-mail:** Comments@FDIC.gov. Include RIN **3064-AE38** in the subject line of the message.
- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

- **Hand Delivery/Courier:** Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.
- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All comments will be posted without change to

<http://www.fdic.gov/regulations/laws/federal/>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION

I. Background

The Federal Deposit Insurance Corporation (FDIC), in regulations codified at 12 CFR. 360.6 (the Securitization Safe Harbor Rule), set forth criteria under which in its capacity as receiver or conservator of an insured depository institution the FDIC will not, in the exercise of its authority to repudiate contracts, recover or reclaim financial assets transferred in connection with securitization transactions. Asset transfers that, under the Securitization Safe Harbor Rule, are not subject to recovery or reclamation through the exercise of the FDIC's repudiation authority include those that pertain to certain grandfathered transactions, such as, for example, asset transfers made prior to December 31, 2010 that satisfied the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule) for sale accounting treatment under generally accepted accounting principles (GAAP) in effect for reporting periods

prior to November 15, 2009 and that pertain to a securitization transaction that satisfied certain other requirements. In addition, the Securitization Safe Harbor Rule provides that asset transfers that are not grandfathered, but that satisfy the conditions (except for the legal isolation condition addressed by the Securitization Safe Harbor Rule) for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009 and that pertain to a securitization transaction that satisfies all other conditions of the Securitization Safe Harbor Rule (such asset transfers, together with grandfathered asset transfers, are referred to collectively as Safe Harbor Transfers) will not be subject to FDIC recovery or reclamation actions through the exercise of the FDIC's repudiation authority. For any securitization transaction in respect of which transfers of financial assets do not qualify as Safe Harbor Transfers but which transaction satisfies all of its other requirements, the Securitization Safe Harbor Rule provides that, in the event the FDIC as receiver or conservator remains in monetary default for a specified period under a securitization due to its failure to pay or apply collections or repudiates the securitization asset transfer agreement and does not pay damages within a specified period, certain remedies can be exercised on an expedited basis.

Paragraph (b)(3)(ii) of the Securitization Safe Harbor Rule sets forth conditions relating to the servicing of residential mortgage loans. This paragraph includes a condition that the securitization documents must require that the servicer commence action to mitigate losses no later than ninety days after an asset first becomes delinquent unless all delinquencies on such asset have been cured.

In January, 2013, the Consumer Financial Protection Bureau (CFPB) adopted mortgage loan servicing requirements that became effective on January 10, 2014. One of the requirements, set

forth in Subpart C to Regulation X, at 12 CFR 1024.41, in general prohibits a servicer from commencing a foreclosure unless the borrower's mortgage loan obligation is more than 120 days delinquent. This section of Regulation X also provides additional rules that, among other things, require a lender to further delay foreclosure if the borrower submits a loss mitigation application before the lender has commenced the foreclosure process and requires a lender to delay a foreclosure for which it has commenced the foreclosure process if a borrower has submitted a complete loss mitigation application more than 37 days before a foreclosure sale.¹

II. Discussion

While the Securitization Safe Harbor Rule does not define what constitutes action to mitigate losses, the preamble to the notice of proposed rulemaking that preceded issuance of the Securitization Safe Harbor Rule² stated, "In this connection, it is important to note that action to mitigate losses may include contact with the borrower or other steps designed to return the asset to regular payments, but does not require initiation of foreclosure or other formal enforcement proceedings."³ Accordingly, it should be unlikely that the 90-day loss mitigation requirement of the Securitization Safe Harbor Rule would conflict with the foreclosure commencement delays mandated by the CFPB under Regulation X. However, as there may be circumstances where commencement of foreclosure is the only available and reasonable loss mitigation action, the FDIC is proposing to amend the Securitization Safe Harbor Rule to make clear that the Rule does

¹ See 12 CFR 1024.41(f) and (g).

² 77 FR 27471(May 17, 2010).

³ 77 FR 27479.

not require documents governing a securitization transaction to require any action prohibited by Regulation X.

III. Policy Objective

The objective of the Proposed Rule is to facilitate regulatory compliance and ease regulatory burden by ensuring that regulations are clear and consistent with other regulatory initiatives. In particular, the objective of the Proposed Rule is to harmonize the residential loan servicing condition of the Securitization Safe Harbor Rule with the CFPB's loan servicing requirements.

IV. Request for Comment

The FDIC invites comment from all members of the public on the Proposed Rule. Comments are specifically requested on whether additional changes to the servicing provisions included in the Securitization Safe Harbor Rule need to be modified so as not to conflict with other applicable laws or regulations. The FDIC will carefully consider all comments that relate to the Proposed Rule.

V. Administrative Law Matters

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) (PRA) the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Proposed Rule would not revise the Securitization Safe Harbor Rule information collection 3064-0177 or create any new information collection pursuant to the PRA. Consequently, no submission will be made to the Office of Management and Budget for review. The FDIC

requests comment on its conclusion that this NPR does not revise the Securitization Safe Harbor Rule information collection, 3064-0177.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires an agency to provide an Initial Regulatory Flexibility Analysis with a proposed rule, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603-605. The FDIC hereby certifies that the Proposed Rule would not have a significant economic impact on a substantial number of small entities, as that term applies to insured depository institutions.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat.1338, 1471) requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Proposed Rule in a simple and straightforward manner.

List of Subjects in 12 CFR Part 360

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and recordkeeping requirements, Savings associations, Securitizations.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend 12 CFR part 360 as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

1. The authority citation for Part 360 continues to read as follows:

Authority: 12 U.S.C. 1821(d)(1),1821(d)(10)(C), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

2. Revise § 360.6(b)(3)(ii)(A) to read as follows:

§360.6 Treatment of financial assets transferred in connection with a securitization or participation.

(b)***

(3)***

(ii)***

(A) Servicing and other agreements must provide servicers with authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents shall require that the servicers apply industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular class of investors, that the servicer maintain records of its actions to permit full review by the trustee or other representative of the investors and that the servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies have been cured,

provided that this requirement shall not be deemed to require that the documents include any provision concerning loss mitigation that requires any action that may conflict with the requirements of Regulation X (12 CFR Part 1024), as Regulation X may be amended or modified from time to time.

Dated at Washington, D.C., this 22nd day of October, 2015.

By order of the Board of Directors.
Federal Deposit Insurance Corporation

Robert E. Feldman
Executive Secretary

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